United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

PETITION

75-4164

APPEAL

75-6068

ORIGINAL

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,
Plaintiffs-Appellants,

—against—

RUSSELL E. TRAIN, *et al.*
["Federal Defendants"],
Defendants-Appellees, and

HERITAGE HILLS OF WESTCHESTER, *et al.*
["Private Defendants"],
Intervenors.

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,
Petitioners,

—against—

ADMINISTRATOR OF THE U. S. ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN,
Respondent, and

HERITAGE HILLS OF WESTCHESTER, *et al.*
Intervenors.

Appeal from the U.S. District Court for the Southern District of New York

Petition to Review Order of U.S. Environmental Protection Agency

APPELLANTS-PETITIONERS' REPLY TO INTERVENORS

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Dated: New York, New York
January 9, 1976

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FOR THE SECOND CIRCUIT

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APPELLANTS-PETITIONERS' REPLY TO INTERVENORS

PRELIMINARY STATEMENT

This Court granted the Intervenors leave to file their answering brief on December 3, 1975. When Appellants-Petitioners filed their reply brief on December 1, 1975, responding to the answering brief of the Federal Defendants, they reserved their rights to reply to the Intervenors' brief under Federal Rules of Appellate Procedure 28(c) and 31(a).

This brief constitutes that reply and includes in the appendix certain further new documents to supplement the record on the Petition, Docket 75-4164, in response to the additions to that record made by the Intervenors.

Appellants-Petitioners do not repeat the arguments and facts previously set forth in their principal brief dated October 20, 1975, and in their reply brief dated December 1, 1975. This brief is submitted solely to correct misstatements of fact in the Intervenors' brief and to rebut Intervenors' misplaced arguments.

I. SINCE THE ENVIRONMENTAL PROTECTION AGENCY HAS DISREGARDED PROTECTION OF NO BOTTOM MARSH, THE AQUIFER AND BROWN BROOK, THE NPDES PERMIT MUST BE SET ASIDE.

The thrust of the Intervenors' case appears to be that Appellants-Petitioners have had their chance to be heard before administrative agencies and should not be heard again in Court. This contention is pressed both through procedural arguments such as alleged impropriety of the Rule 54(b) certification or the time-bar (discussed in Part II, infra) and also through substantive arguments such as the scope of permitted review on appeal.

Although their case is framed in different forms, at its core the Intervenors' argument is that the danger of pollution from their sewage effluent pipe was adequately considered by the New York State Department of Environmental Conservation ("DEC") and that a Court should not cover the same ground again on review. In support of this claim, the Intervenors' have filed the transcript, without the exhibits, of a hearing before the DEC involving a permit to relocate Brown Brook to make way for the site of the sewage treatment plant for Heritage Hills of Westchester.

Intervenors' argument, however, lacks a firm foundation in the facts of this case and is unsupported by the very authorities which Intervenors have adduced. "'Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings,' the protections afforded by due process of law entitles the individual to show that the governmental action was unwarranted." Greene v. McElroy, 360 U.S. 474, 496 (1959), cited in Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir., 1972).

The sad fact here is that none of Appellants-Petitioners have yet had the opportunity of showing that issuance of the NPDES Permit was unwarranted; the Appellants-Petitioners have been denied opportunity to make their showing of unwarranted EPA action even though they have established exhaustively the nature and facts of their injury arising from the pollution allowed by the NPDES Permit. Neither the Federal Defendants nor the Intervenors have adduced comparable evidence to rebut those facts.

A. APPELLANTS-PETITIONERS HAVE NEVER BEEN HEARD TO PRESENT THEIR FULL EVIDENCE

Since the EPA never saw the DEC transcript which has been submitted in Petition No. 75-4164 by the Intervenors, it is not relevant here. Even if it were, however, it would not help the Intervenors' case, for that record is not complete.

Intervenors are incorrect in citing at length the DEC transcript in support of their contention that Appellants-Petitioners were heard fully and that the Administrator of United States Environmental Protection Agency ("EPA") was entitled to accept that hearing as having examined sufficiently all environmental protection issues.

As is set forth in the initial affidavit of Raul Cardenas, Ph.D.,* he did testify on a preliminary basis at the DEC hearing. However, Dr. Cardenas was not allowed to present his full testimony. The Hearing Officer ruled that the nature of the sewage effluent was irrelevant to the narrower issue of stream protection. The Hearing Officer noted that the State Pollutant Discharge Elimination System ("SPDES") proceedings under Article 17 of the Environmental Conservation Law were the proper forum for effluent testimony. Thus, on September 18, 1973, the Hearing Officer observed:

> "There have been new statutory provisions taking effect the first of September involving effluent discharges. These matters are still to be determined in the future." [Tr. 183; also see Tr. 1181-1184 and 1352]

Intervenors Papparazzo and McGann, who were the applicants in that DEC hearing, objected vigorously to even the limited

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* Sworn to December 2, 1974; Document 10 on appeal.

testimony which Dr. Cardenas gave. They supported the Hearing Officer's ruling that such evidence was extraneous and irrelevant. Considering their position at the DEC hearing and here, there is a basic unfairness inherent in Intervenors' argument. Before the DEC they urged that it was improper to receive evidence of pollution effluent damage and they succeeded in excluding it; before this court they urge that Appellants-Petitioners had their chance to present evidence once and having had their day cannot put in more evidence now.

One instructive example can illustrate just how restricted the DEC opportunity actually was. Although the Intervenors presented as an exhibit a report by their own experts "Biological Consultants" [Staten Island, New York] about Brown Brook, this report was not made available to Dr. Cardenas for examination by him. The Report's principal author, Dr. Emmanuel Sorge, was not called as a witness. Parts of the Report crucial to Appellants-Petitioners' claims here were minimized or overlooked by the DEC Hearing Officer, as when he blithely observed in his hearing decision [41b-55b] that the effluent (whatever its composition might be) would not harm the Brook, or when he ignored the Marsh and aquifer entirely and dismissed the fish as not being "unique". The Report at page 32 stated that Brown Brook was "on the borderline from passing from naturally enriched to the polluted condition. Further nutrient loading would tend to increase the dominance of pollution indicator species." The Report further summarized at p. 61 that Brown Brook appeared "to be nutrient

enriched .... Further nutrient loading, in particular, off the Warren Street - Route 202 Pond would tend to increase the dominance of pollution indicator species many of which can cause disturbing odors. ... [W]e are dealing with an unpolluted system which is receiving nutrient enrichment."*

Dr. Sorge's report for Biological Consultants shows that he had no knowledge of conditions in No Bottom Marsh; he was apparently ignorant of the aquifer downstream. Despite the ready availability of the experts from Biological Consultants, their testimony has never been employed by Intervenors to rebut the expert affidavits offerred by Appellants-Petitioners. Intervenors have done no more than offer the view of their construction engineer, Leonard J. Bibo [e.g. 31b-39b], to reply to experienced biologists' expertise. Such a reply is simply not competent evidence.

This one example out of several is sufficient to demonstrate how the DEC inadequately considered the crucial issue of pollution to Brown Brook and how it ignored any harm to No Bottom Marsh, the aquifer, and the fish, in its hearing. Since the DEC ruled that the evidence about effluent would be heard later for the SPDES Permit, Kipp and Sun had no occasion to challenge the ruling or the dicta in the hearing officer's recommendations for the ruling.

When Sun and Kipp were advised the DEC would not hear their further evidence, Sun sued to compel a hearing. This was not an

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* Relevant excerpts of this Report, including pages 32 and 61 appear as Exhibit C to the affidavit of Dr. Cardenas, sworn to December 2, 1974; Document 10 on appeal.

action "filed too late" (Intervenors' Brief at 23) because of Sun's fault; it was filed in good faith because neither the DEC nor EPA told Sun that the NPDES Permit had been issued. The Order to Show Cause in that New York State Court proceeding (appended hereto A92-A101) is the best evidence of the fact that Sun and Kipp were kept uninformed and denied their opportunity to present their evidence despite Kipp's repeated entreaties to have the chance.

Intervenors' position to the contrary notwithstanding, all this discussion of the DEC proceedings is largely irrelevant to the case at bar. Intervenors make much of the DEC ruling, but the Federal Defendants quite properly pay it little heed. The DEC proceedings are not germaine here because EPA never had grounds to rely upon them. EPA never saw the transcript; it quoted from the DEC Hearing Officer's recommendations but it apparently never saw the text from which the quote was extracted. The fair inference is that the quote was conveyed by telephone from the DEC.

Even if EPA had been provided with the whole DEC hearing transcript and all exhibits, such as Dr. Sorge's report, it still would have had a duty to explore independently the merits of any issues present in new expert evidence such as Kipp and Sun had proferred. [A78-79] As this Circuit Court ruled in Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir., 1965), in language which has become a classic statement of administrative law:

> "In this case, as in many others, the [agency] has claimed to be the representative of the public interest. This role does not permit it to act as an umpire, blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the [agency] ... the [agency] must see to it that the record is complete. The [agency] has an affirmative duty to inquire into and consider all relevant facts." [emphasis added] 354 F.2d at 620.

Since the EPA ignored evidence offered with respect to the aquifer, fish and wetlands, it failed to protect the public and meet the standards prescribed in the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251, 1312, 1341, 1342 ("Water Act"). It also used a bureaucratic decision-making procedure (A6-A9, A14-A16; Record on Petition) which violated the requirements of §102(2)(A) and (B) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(A) and (B) ("NEPA"), that interdisciplinary and ecologically sensitive procedures be used.

Just as the Intervenors raise a smokescreen of sorts by pressing the DEC proceedings, so they seek by innuendo and misstatement to characterize Kipp as bent on a vendetta to destroy them, and to portray Sun as Kipp's "alter ego," and to picture Homan and Southern New York as lackies of Kipp. The record here establishes the inaccurancy of such suggestions. Intervenors' baseless ad hominem claims have no place in proceedings such as these.

The Order to Show Cause and Complaint reveal that the only conduct by Intervenors put in issue was the pollution to be allowed by the NPDES permit, and the siltation and flooding. It

therefore is simply incorrect to write that "Appellants brought suit ... to enjoin the Intervenors from completing" their apartments. [Intervenors Brief at 3, and also 10 and 43]. Similarly, by his affidavit sworn to February 25, 1975 (Document 39 on Appeal) Kipp answered the incorrect statements contained in Intervenor McGann's affidavit [3b-29b]. These corrections need not be repeated here. Likewise, it is incorrect to say that Appellants-Petitioners did not give the requisite 60 days notice of intent to invoke their rights under §505 of the Water Act, 33 U.S.C. 1365 [Intervenors Brief at 35]. By letter to the EPA and by their Complaint, dated January 7, 1975, paragraph 46, notice was given. It is instructive that the EPA has not raised this notice issue. Intervenors should more closely examine the record on these issues.

More insidious are the several suggestions that the suit is a mere skunk fight between two riparian landowners [Intervenors Brief at 9], or that Sun was embarked on a program of harrassing the Intervenors [Id. at 10], or that Sun's gravel operations necessarily ruined any natural resources on the Sun property [Id.], or that the Southern New York Fish and Game Association ("Southern New York") is a mere fishing and hunting club under Homan's control without a care for conservation [Id.].

As the affidavit of Homan on behalf of Southern New York shows,* Southern New York and its members engage actively in conservation work, protection of fishing areas, and education about many aspects of recreational fishing. They used Brown Brook and No Bottom Marsh long before Sun owned the site. Their Board of Directors authorized suit

* Sworn to December 11, 1975, Document 8 on Appeal.

here only after thorough inquiry into the need to protect the fish and wildlife and vindicate the Fish and Wildlife Coordination Act, 16 U.S.C. 661.

Sun is only concerned with protecting its resources. Sun is a family corporation owned by Kipp and his immediate relatives; if Sun is injured, a major part of the family equity is destroyed. Sun is not just Lyman Kipp's interest or "alter ego." In support of the Petition, Docket No. 75-4164, Sun and Kipp have appended hereto relevant portions of a "Report on Public Water Supply Study" by the consulting engineer of the Town of Somers. This Report independently corroborates the legitimacy of and reasons for Sun's concern about pollution of its aquifer:

> "A large wetland area of over 100 acres exists on the Sun Enterprises property south of Route 202 and west of Route 100. This area appears to contain a considerable amount of ground water in a gravel aquifer .... This water source could be a potential water supply for the immediate area or possibly as an interconnection with other sources in the future." [A104]

The Report noted that only three sources of water supply exist in the study area, the Sun aquifer being the third [A113]. Thus, Sun has a legitimate economic interest in defending its water, the Marsh which protects and recharges the aquifer, and the Brook through which pollution is borne to the aquifer. It is unseemly to demean such legitimate interests by alleging that Kipp sought harrassment or was motivated by evil intent. Sun also appends here relevant parts of a recent deposition in support of Petition No. 75-4164; in that deposition Intervenor McGann recanted and withdrew from such hyperbolic allegations. [A116-A129]

Thus, the facts of record show that DEC shut the door on Sun and Kipp; EPA failed to explore all facts or even to independently determine what facts needed exploration; and Appellants-Petitioners' legitimate interests were injured without redress administratively.*

B. THE SCOPE OF REVIEW OF THE INSTANT PETITION REQUIRES EXAMINATION OF EPA'S INADEQUATE RECORD

Intervenors' contend that the NPDES Permit was based upon substantial evidence and "there is not present basis for either this Court or the District Court to question EPA's judgment ...." [Intervenors' Brief at 36].

Examination of this contention requires discussion of the standard for judicial review, which in part turns on identifying the jurisdictional basis for this suit. With respect to District Court review of the EPA action, in addition to the cases previously cited by Appellants-Petitioners, a further decision, N.R.D.C. v. Train, -- F.2d --, 8 E.R.C. 1233, 5 E.L.R. 20578 (D.C. Cir., September 15, 1975, Docket No. 74-1538), recently has addressed the relationship between §505 and §509 of the Water Act, 33 U.S.C. 1365 and 1369, and the Administrative Procedure Act, 5 U.S.C. §§701-706 ["APA"], and federal question jurisdiction, 28 U.S.C. 1331. That Court held that the District Court had jurisdiction under the APA to review whether an abuse of discretion existed. Such jurisdiction was held to be concurrent with §505

* It is also irrelevant that Kipp wrote many letters seeking aid from any and all relevant officials. Without advice of counsel, and unschooled in the complex new environmental bureaucracies and procedures, Kipp openly and vigorously pursued his rights as a citizen. Perhaps his many letters numbed officials of the DEC into not taking him as seriously as they should have, but this failure does not excuse the EPA from ignoring Kipp and Sun.

of the Water Act. Until the EPA lists effluents to be restricted in promulgating national standards, the court ruled, no specific national standards could be promulgated to ever then be reviewed under §509 of the Water Act. District Court review was allowed in accordance with the APA's mandate that the Court "review the whole record or those parts of it cited by a party...." 5 U.S.C. 706.

In the District Court below, the Appellants-Petitioners here challenged, inter alia, the sufficiency of EPA's compliance with duties mandated by the Water Act and with procedural due process of law. The District Court below could have examined the record put before it; it chose not to, and its error is presented here.

On the original jurisdiction before this Circuit Court, the Appellants-Petitioners seek an order invalidating the NPDES Permit, or alternatively remanding the Permit proceedings back to the EPA with instructions to reopen them and restrain all effluent emissions from the Heritage Hills sewage pipe in the interim.

Under §509 of the Water Act, the standard for review is probably broader than the substantial evidence rule. Section 509 does, after all, contemplate remand to the EPA for more fact-finding while the Circuit Court retains jurisdiction. The Circuit Court will thus become involved in the weighing of evidence gathered anew by the EPA for the Court. The review becomes one de novo. See 4 DAVIS, ADMIN. L. TREATISE §29.07 (1958 Ed., at 152); cf. Jordan v. United Ins. Co. of America, 289 F.2d 778 (D.C. Cir., 1961).

This Court need not decide which is the applicable standard for review here, however, since Appellants-Petitioners satisfy both standards; in any event, a ruling on the procedural denials of due process discussed in Part II, in fra, would obviate the necessity of passing to consideration of evidentiary issues.

Applying the substantial evidence test to the Petition here, Intervenors urge that since testimony was proffered and rejected once, it cannot be considered on review here (Intervenors' Brief at 31-33). They also contend that since the DEC allowed some testimony for Sun and Kipp - albeit preliminary and based on only two weeks of field study - somehow "it is clear beyond peradventure that both state and federal authorities actively participated in the formulation of the effluent standards prescribed in the NPDES permit and that they did so only after giving careful consideration to Petitioner's objections." [Id. at 33]

There are, however, serious lacunae in the EPA record as shown by the expert testimony here. Dr. Cardenas has submitted 1 1/2 years of data and is joined in his analysis for the first time by Dr. Guenther Stotsky, Chairman of the Biology Department of New York University, as well as again by the hydrologist Dr. Gidlund, and others. Despite such hard new data showing real harm (e.g. A131-A135), Intervenors would have the Court ignore the experts' recitation of the harm which the NPDES Permit causes and the experts' appraisal of which factual issues should have been studied by EPA but were not.* Under the substantial evidence

* See, e.g., the affidavit of Dr. Cardenas was sworn to April 8, 1975, A131-A135, which completes the record as to Intervenors document at 89b; affidavits of Drs. Stotsky, Gidlund, et al., appears as Documents 7-11 on Appeal.

test, it is clear from the whole record that evidence of danger to Brown Brook from nutrient enrichment was noted, but not studied (and certainly not rebutted); accordingly, the ruling by EPA granting here a NPDES Permit which allows polluting nutrients to enter the Brook and Marsh lacks a factual basis sufficient for a reasonable mind to conclude that no harm to the environmental interests protected under the Water Act will occur. The EPA's disregard for No Bottom Marsh shows a further violation of the Agency's own wetlands regulations, 38 Fed. Reg. 10834 (May 2, 1973), and the overall duty which NEPA imposes on the EPA.

As Chief Justice Hughes observed in Consolidated Edison Co. of N.Y. v. N.L.R.B., 305 U.S. 197 (1938), where a record is barren of evidence relevant to and necessary for a finding of fact, it is not sustained by substantial evidence. The EPA's failure to adduce evidence on pollution by nutrients and on the wetlands, fish and wildlife vitiates its decision to issue the NPDES Permit.

Producing the incomplete DEC record, even if relevant, does not change this conclusion. The weight of the evidence, after all, is measured by its quality and reasonableness, not by its mass and volume.

If de novo review of the Petition is determined to be the valid standard, then the same unrebutted affidavits of the independent experts adduced by Appellants-Petitioners establish the need to revoke the NPDES Permit and require relocation of the effluent pipe, or at the very least a remand to the EPA and stay of the NPDES Permit in the interim under §509 of the Water Act.

II. EPA'S VIOLATIONS OF LEGAL PROCEDURE ARE FATAL TO THE NPDES PERMIT, AND NOTHING PREVENTS THE PRESENT REVIEW OF THESE DEFICIENCIES

Is elementary that the EPA's denials of procedural rights here afford ample justification and cause for voiding the NPDES Permit.

Notice was not given of issuance of the NPDES Permit. Bank of Commerce v. Bd of Governors, 513 F.2d 164 (10th Cir., 1975) does not help Intervenors in their claim that publication in the Peekskill Evening Star satisfies the requirements of notice outlined in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Bank of Commerce involved notice in the Federal Register. Unlike the presumption of hearing notice provided for the Federal Register under 44 U.S.C. 1508, newspaper notice is only effective under the regulations here if it is actually published in a local newspaper. Peekskill's paper is not local in Somers.

Here notice is required to permit a party to invoke §509 of the Water Act. The review by petition could have been initiated and completed before the sewer pipe was in use had EPA given the required notice. Actual notice was lacking for Homan and Southern New York; effective notice for Sun and Kipp was lacking since nearly 90 days of the statutory review period set forth in §509 had expired before actual notice was obtained. By the time the scientists for Sun and Kipp had evaluated the NPDES Permit in order

to advise Sun regarding the Permit's deficiencies, the 90 days had expired.

Moreover, unlike the notice requirement in Bank of Commerce, the regulations here also required personal notice to Kipp and Sun. 38 Fed. Reg. 13535-6, 40 C.F.R. §125.32(a)(2) (May 22, 1973). EPA never sent such personal notice. The lack of notice caused prejudice and unfairness to Sun and Kipp, including the expense and time devoted to the abortive New York State Supreme Court proceeding (A136) and the need to commence suit in the District Court below, not to mention the actual harm to the Brook, Marsh and aquifer. Having virtually conceeded this "technical oversight" [Intervenors' Brief at 43], Intervenors can hardly deny that prejudice has occurred.

Beyond deficiencies of notice, the failure to consult with the Fish and Wildlife Service of the Department of the Interior ("Interior") violates the Fish & Wildlife Coordination Act, 16 U.S.C. 661. The District Court below received a letter from Congressmen Dingell and Reuss, dated March 28, 1975, asking to have their views noted as amicus curiae interpreting the Coordination Act's consultation requirement. While the District Court appears to have taken no notice of the letter, it does further reflect Congressional oversight on the meaning of consultation under the Coordination Act. Accordingly, the text is appended hereto in support of the Petition No. 75-4164. (A146-A152), together with the response by the Assistant U.S. Attorney on behalf of the Federal Defendants (A153-A155). These views rebut Intervenors' contentions here.

The Intervenors' citation to Commissioner v. Wathen Dist. Co., 147 F.2d 998, 1001 (6th Cir., 1945), is not very helpful here. The case does not support Intervenors' contention that Interior's default under the Consultation Act should not affect EPA. In Commissioner v. Wathen Dist. Co., letters actually were exchanged, and more importantly no agency conduct involving a major federal policy was involved.

Intervenors never explain why they deem consultation merely a "technical" requirement. Effective consultation here should have identified the values of the Marsh and fish and prompted EPA to explore these further. The protection of these resources would save Sun's aquifer. Such efficacy is hardly a minor procedural element. Contrary to Intervenors' hyperbole (Intervenors' Brief at 45), the sewage from Heritage Hills can be trucked elsewhere for disposal while a new Permit is sought; no shut down of apartments is inevitable or necessary. The brief of the amicus curiae, Natural Resources Defense Council, Inc., dated December 5, 1975, properly interprets the "report and recommendations" reference in 16 U.S.C. 662(a) as requiring considerably more than a technical procedure suggested by Intervenors' version.

Unable to otherwise rebut the merit in these substantive legal claims, Intervenors resort to two procedural issues to avoid at the threshold any judicial review: (1) the validity of the Rule 54(b) certification and (2) the time-bar.*

* Intervenors' Brief at 9 in the footnote also contests the standing of Brown Brook and No Bottom Marsh appearing as plaintiffs by their next best friends Kipp and Homan. While conceeding Sun and Kipp's interests, Intervenors offer no reason for opposing suit by next of friend, except that the Brook and Marsh are not "person" under the Water Act. No such limitation necessarily exists in the Water Act, and in view of the remedial nature of the Water Acts' enforcement and review provisions, "person" includes individuals as next best friends. The "person" issue does not apply to the other jurisdictional statutes.

Intervenors are simply wrong in attacking the District Court's Rule 54(b) certification. The decision as to entry of a final order as to all claims against the federal defendants in this multi-party case is committed to the sound discretion of the District Judge. 6 MOORES FED. PRAC. par. 54.41[3] (p. 741, 1975 ed.). Dismissal for want of jurisdiction is a final order appropriate for certification. Id. at par. 54.27[6] (p. 343); Farrell v. Piedmont Aviation, 411 F.2d 812 (2d Cir., 1969); Beverly Hills Fed. Sav. & Loan Ass'n v. Webb, 406 F.2d 1275 (9th Cir., 1969). The parties may invoke exercise of such discretion by agreement. Interborough News Co. v. Curtis, 127 F.Supp. 286, supp. op. 127 F.Supp. 359 (S.D.N.Y., 1955) aff'd 225 F.2d 289 (2d Cir., 1955).

On issues of first impression, where allegations of eventual irreparable harm are made, and where appeal of dismissed Water Act §402 (NPDES Permit) claims is irrelevant to and in no way involves the trial of Water Act §404 (dredge and fill permit) claims still pending in the District Court, certification under Rule 54(b) is appropriate. Since the District Court's opinion essentially required filing of a §509 Petition, and does reflect the competing considerations involved in the dismissal, it was a proper and economic use of judicial time to consolidate the jurisdictional appeal with the §509 Petition.* Moreover, as the Coordination Act claims were split by the District Court along the same jurisdictional lines (A43), they too were ripe for review.

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* The Affidavit of Support of the Rule 54(b) application by Nicholas A. Robinson, sworn to July 23, 1975 (A156), further marshalls the considerations favoring entry of a Rule 54(b) certificate. These were on the record and together with the District Court Opinion make clear the basis for the exercise of discretion by the District Court.

To refuse to grant certification would result in a harsh case hardly improving the administration of justice. Campbell v. Westmoreland Farm, Inc., 403 F.2d 939 (2d Cir., 1968). The exercise of discretion below was well within the parameters permissible. Int'l Term. Operating Co. v. Waterman S.S. Co., 272 F.2d 15 at 16, n. 2 (2d Cir., 1959), cert. den. 362 U.S. 919 (1960).

Just as the Appeal is valid, so also the Petition is not time barred. Certainly the discoveries which Dr. Cardenas reported in April of 1975 (A131-A135), that with the sewage pipe in use the NPDES Permit in fact was allowing serious pollution, qualify under the §509(b)(1) definition of grounds arising after the 90th day. Certainly also the EPA's negligence in giving improper notice is a ground for equitable estoppel of the 90-day limit in any event. Intervenors effectively rebut none of these grounds.

CONCLUSION

The NPDES Permit must be voided.

Dated: New York, New York
January 9, 1976

Respectfully submitted,

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DOCUMENT APPENDIX

(continued from Briefs by Appellants-Petitioners dated October 20, 1975 and December 1, 1975)

* Documents marked with an asterisk are submitted only in support of Petition No. 75-4164 in order to complete that record in view of the decision by Intervenors to file further materials in that proceeding. These are not documents on appeal, although items 5 and 6 above of course were before the District Court.

REPORT ON

PUBLIC WATER SUPPLY STUDY

TOWN OF SOMERS
WESTCHESTER COUNTY, NEW YORK

OCTOBER, 1975

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October 9, 1975

Planning Board
Town of Somers
Somers, New York

Gentlemen:

I submit herewith for your review, a Report on Public Water Supply Study for the Town of Somers.

The report contains discussions on existing conditions, proposed improvements, conclusions, recommendations and cost estimates for the study area.

Please note that these cost estimates are not detailed estimates, but rather comparative figures to help determine order of magnitude of the various proposed projects.

Certain conclusions are drawn and recommendations presented for action by the Town Board.

It is recommended that you review this report and submit it to the Town Board for their adoption as a Master Plan for water supply.

Respectfully submitted,

William A. Marcon

William A. Marcon, P.E.

WAM:bl
Enc.

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APPENDIX-A

REPORT ON
PUBLIC WATER SUPPLY STUDY

I. INTRODUCTION

This report has been prepared under the jurisdiction of the Planning Board of the Town of Somers by authorization of the Town Board.

With a growth pattern established by the approval of two large DRD Projects, namely Heritage Hills and Primrose Farms, the Town of Somers became increasingly aware of the need for a plan for water supply and distribution, both within its boundaries and in connection with the neighboring towns to the west and east. Several meetings were held with Land Development Association Presidents and the Town officials in the early part of 1974, to discuss the possibility and the effect of forming water districts within the Town. The Town Board subsequently authorized the Planning Board to direct the Town's Consulting Engineer to undertake a study of the water supply in the Town and prepare a report for review and acceptance by the Town Board, which could be used as a master plan for a Town Water System.

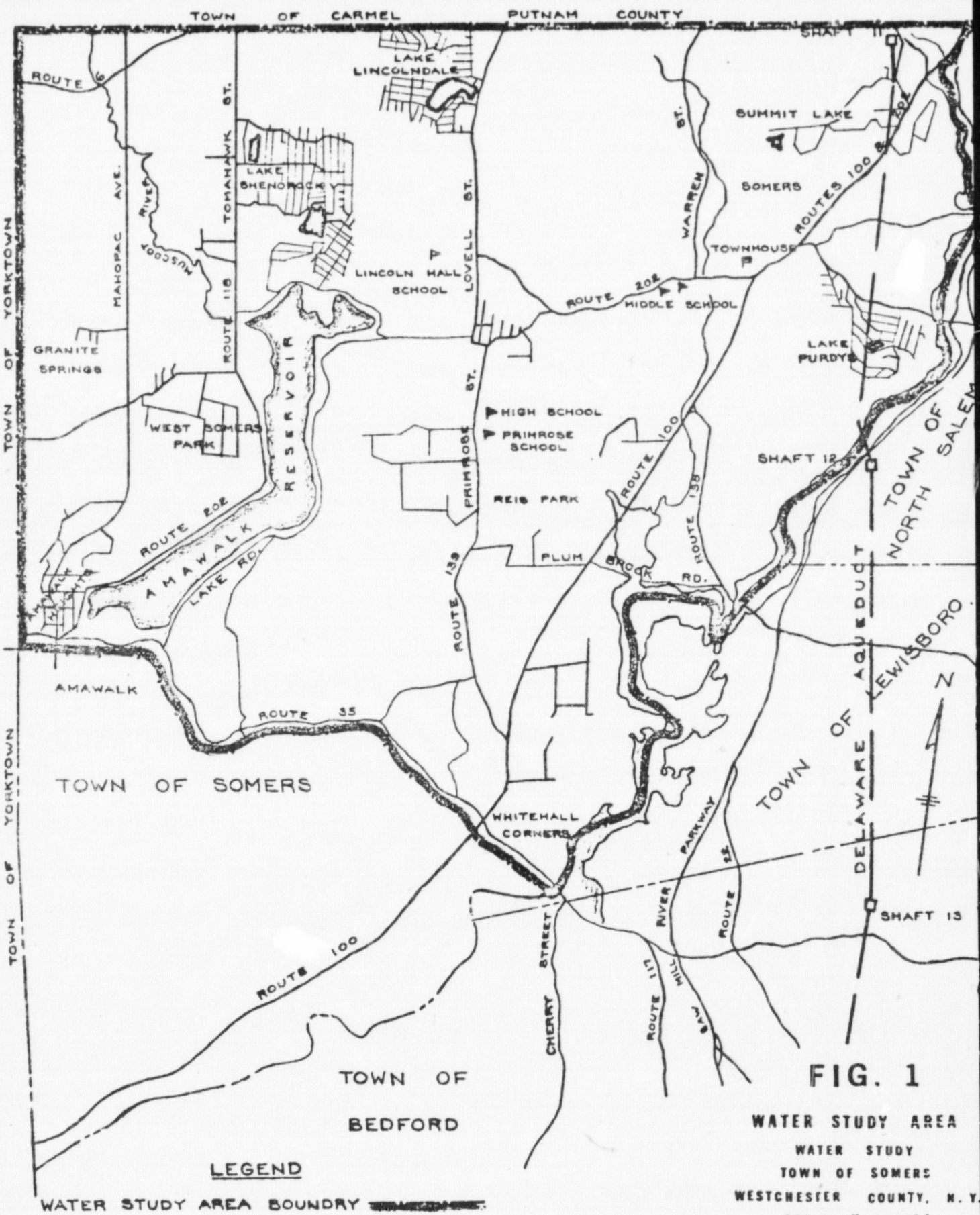
Based upon the results of discussions and meetings noted above and also upon the actual growth of the Town and proposed growth as indicated in the Town Development Plan, a study area was selected as the entire area of the Town north of Route 35. This area was experiencing greatest growth and also was recommended for the type of zoning and density which could support a water system. The area south of Route 35 is proposed for low

density and consequently was not considered necessary for a detailed water study at this time.

The study area is bounded on the west by the Town of Yorktown, on the north by Putnam County, on the east by the Towns of North Salem and Lewisboro and on the south by other lands of the Town of Somers and Route 35. The area consists of approximately 16,000 acres and has a present population of ten thousand (10,000) people. The extent of the study area is shown in Figure I.

The County at the present time is in the process of up-dating its comprehensive public water supply study for Northern Westchester which was completed in August of 1967. The proposed County Study will be a broad study of the Towns of Northern Westchester and will be oriented to the sources of supply and transmission of water between the neighboring towns. The Somers water study has been prepared in recognition of the previous County water study of 1967 and also its up-dating but oriented to the existing water districts within the Town, the existing high density areas which are a potential problem for water supply, and the remaining areas of the Town which are as yet undeveloped or in the early stages of development.

Information for the study was obtained by the Town's Engineering Department using the Town's Development Plan for a guide to future development of the area and the actual count of existing housing and development in the study area at the present time. Data has been compiled on a day to day basis over the past year,



LEGEND

WATER STUDY AREA BOUNDRY

FIG. 1

WATER STUDY AREA

WATER STUDY
TOWN OF SOMERS
WESTCHESTER COUNTY, N. Y.
SCALE: 1": 4000'±

as development has taken place and changed the pattern from time to time.

Meetings have been held periodically with the County Water Agency to keep current with its progress and investigations of the water supply on the County level. Discussions have also been held with officials of the City of New York, Bureau of Water Supply which controls either directly or indirectly, the major source of supply available to the study area.

The purpose and intent of this report is to present to the Town a document of technical information which can be used as a Master Plan and guide to coordinate the water supply development in the study area and to provide the most efficient use of this development. It should also establish a basis for priorities and a capital improvements program for a Town Water Supply in the area. It is expected that the report will be periodically reviewed and up-dated to keep pace with the latest changes in the Town. Consequently, any programs adopted must be flexible and capable of modification as development patterns change.

Cost figures have been presented based upon the writer's best available data at the present time. Due to the changing economy, these figures must be considered as preliminary and subject to revision when more detailed information becomes available at the time of a specific project. The priorities, conclusions, and recommendations presented are based upon the writer's intimate knowledge of the Town and its development and may be subject to modification if the present trends in the development of the area are changed to any great extent. Detailed water quality informa-

I. INTRODUCTION (Continued)

tion and data including maps and diagrams of the various water sources in the Town of Somers have been adequately discussed and presented in the County Water Report of 1967. This information is available if desired or needed and is purposely omitted in this report to avoid redundency and additional unnecessary study.

A102

II. EXISTING CONDITIONS

The study area at present is served by six (6) water districts or water service areas, one of which is a private water service area for an institution. All other development at the present time is provided with water from individual wells or out of district service from the Town of Yorktown to the west. Generally the water systems mentioned obtain their water from wells, either rock wells or gravel wells. Two of the systems, namely Amawalk Heights and Primrose Farms, are or will be supplied from the Yorktown Water Distribution System taking its supply from Amawalk Reservoir.

The Amawalk Reservoir owned by the City of New York, is located entirely within the study area and is the source of supply for the county built and Town of Yorktown operated, filtration plant located immediately south of the Amawalk Dam. The filtration plant has a present capacity of four and a half million gallons per day and can be expanded to 8 and 14 million gallons per day with the addition of new pumps and filters. Running north to south in the extreme easterly portion of the study area is the Delaware Acqueduct which is one of the sources of water supply for the City of New York.

Shaft 11 located on the Delaware Acqueduct in the extreme northeast corner of the study area offers an available connection to the Acqueduct for the Town of Somers and adjoining Towns.

Water mains from the Town of Yorktown Distribution system are available to the study area at the Town boundary at Route 6, at Granite Springs Road, and also at Route 35.

A large wetland area of over 100 acres exists on the Sun Enterprises property south of Route 202 and west of Route 100. This area appears to contain a considerable amount of ground water in a gravel aquifer. Within the wetlands area is a pond of approximately 8 acres which has been excavated for gravel purposes. This water source could be a potential water supply for the immediate area or possibly as an inter-connection with other sources in the future. A present well in the wetlands area is reportedly tested at 250 gallons per minute.

Also within the study area along its southeasterly boundary is the Croton River and a portion of the Muscoot Reservoir which at the present time serves as a source of supply for New York City. These waters are chlorinated before entering the New York City system.

There are several other small lakes and ponds within the study area, but none worthy of further investigation as a water supply for the study area. These service areas and districts described herein are illustrated in Figure 2.

HERITAGE HILLS WATER DISTRICT

The Heritage Hills Water District is a Town water district which was formed under the Transportation Act in 1973 and is owned and operated by the Heritage Hills Water Works Corporation. The district covers over 800 acres and has a potential demand of nearly a million gallons per day. The present source of supply for the system consists of two gravel packed wells in the wet lands immediately west of Route 100 on the Heritage Hills property.

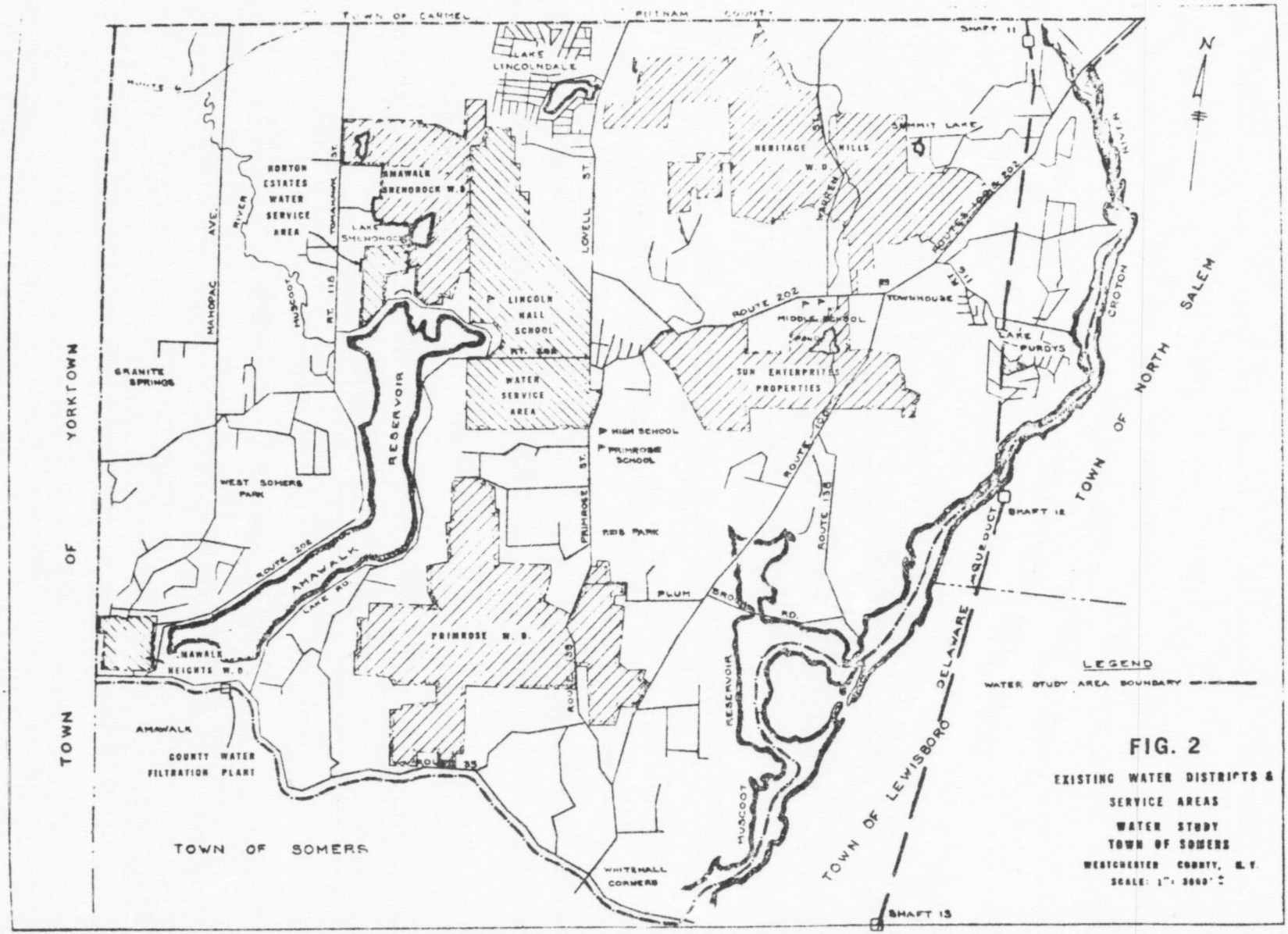


FIG. 2

EXISTING WATER DISTRICTS & SERVICE AREAS

WATER STUDY

TOWN OF SOMERS

WESTCHESTER COUNTY, N. Y.

SCALE: 1" = 3000'

II. EXISTING CONDITIONS (Continued)

A one million gallon steel water tank is completed and supplies storage for the district. It is located on high ground west of Warren Street, on Round Top at an elevation of 744 at high water level. Present indications are that the existing wells for the Heritage Hills development project are adequate for about half of the potential development within the district. The wells pump into a wet well of a pumping station where the water is boosted through a 12" and 14" transmission main to the storage tank. The storage tank in addition to the furnishing of storage, supplies the needed pressure for the gravity system.

AMAWALK-SHENOROCK WATER DISTRICT

This District is a Town Water District with Water Commissioners acting as administrators for the district. The system serves a high density area which began as a summer colony in the early 1930's and has developed into a year round community of over 600 homes. The water source is an infiltration gallery, which is located along the northerly shore of Lake Shenorock, plus a rock well and a gravel packed well on the pumping station property. The water is pumped from the infiltration galleries through a sand filter and is chlorinated before entering the distribution system. A steel storage tank of approximately 430,000 gallon capacity is located on the high ground at the extreme north end of the district at an HWL of 690. The tank furnishes storage plus needed pressure for the distribution system. The distribution system consists of 6, 8, and 10 inch

cast iron pipe. Increasing demand upon the system has promoted the need for an additional source of supply. At the present time the district is in the process of obtaining approval and final designs for a supplementary system which would take water from Lake Shenorock to meet demands during the summer months of July and August.

Increasing demands last year necessitated pumping from the lake through a rented microstrainer in order to meet the additional load on the system.

Fire hydrants are connected to the system and offer fire protection. All systems are metered.

HORTON ESTATES

This system serves approximately forty (40) residences utilizing a natural spring as a supply with a well as an auxilarly source. A 5,000 gallon tank is provided for storage. The system is chlorinated at the present time.

AMAWALK HEIGHTS WATER DISTRICT

This district is located in the south westerly corner of the study area and is serving approximately 83 homes in a high density area. The County Water District No. 2 which was formed in 1969 includes this district. The source of supply for the district is the Yorktown Water Storage and Distribution system which obtains its water from the treatment plant at the south end of Amawalk Reservoir. The immediate source of supply for the district is a connection into the 16 inch main along Route 35 which is a transmission main from the filter plant to the

Yorktown Distribution System. Piping within the Amawalk Heights District is mostly 6 inch cast iron pipe with several small extensions of 2 inch and smaller. All services are metered and payment is made to the Town of Yorktown for water used. The heavy amount of rock in the northerly part of the district discouraged any extension of the mains in a northerly direction over the past several years.

LINCOLN HALL SCHOOL

This water system supplies an institution for boys and is located north of Route 202 at the northeast corner of the Amawalk Reservoir. The site for the school includes about 750 acres. The water supply is served by deep wells about 300 to 400 feet deep. The water is pumped to a steel storage tank of approximately 300,000 gallons capacity which floats on the system and furnishes the necessary pressure as well as storage. No metering is provided in the system. Records indicate approximately 50,000 gallons per day as the present daily consumption.

PRIMROSE WATER DISTRICT

The Primrose Water District has been recently created by the Town as a result of a petition from the Primrose Water Works Corporation. No development has started within the district at the present time and no water facilities have been installed at this date. Plans for the water supply include the installation of a 12 inch transmission main along Lake Road on the easterly side of Amawalk Reservoir and a connection into the existing 16 inch main of the Town of Yorktown supply eminating from the

filtration plant at the base of Amawalk Dam. The Primrose Water system is designed for approximately a half a million gallons per day demand and will include a storage tank of approximately one million gallon capacity located on the high ground of the district area in the vicinity of Catherine Street at a high water level of 646.

DELAWARE AQUEDUCT

The Delaware Aqueduct, which at present appears to be the most plentiful source of water supply for the study area, has a capacity of about 890 million gallons per day. This aqueduct conveys water from the West Branch Reservoir in Putnam County to the Kensico Reservoir in Westchester County. The water flows under pressure through a concrete lined tunnel which is over 300 feet deep under the study area. Normally the water in the Dela-wate Aqueduct is of relatively high quality and at present is not treated for distribution.

The connection at shaft 11 allows certain water from the Croton System to be pumped into the Delaware Aqueduct when needed by the City of New York to increase its supply. This fact coupled with the New York State Health Department policy that all surface sources are subject to pollution and should be treated makes it more doubtful that water can be taken from shaft 11 without filtration and additional treatment in the future. The aqueduct is in good condition and has never been shut down since 1955. It can be considered as an unlimited source of supply for the study area.

II. EXISTING CONDITIONS (Continued)

AMAWALK RESERVOIR

The Amawalk Reservoir is of far less desirable quality than the Delaware Aqueduct and must be treated before distribution. The present treatment plantwhich was constructed by the County under the jurisdiction of County Water District #2 has a present capacity of approximately 4 1/2 million gallons per day. This can be expanded to 14 million gallons per day when the need arises by adding pumps within the present structures and additional filters and clarifiers. At the present time, Yorktown is utilizing about 2 and one-half million gallons per day from the available 4 and one-half million which is presently available.

OTHER AREAS

There is still a considerable amount of open land which is undeveloped within the study area. These lands include: the Koegle property in the northwesterly corner of the study area; lands of General Industries and Windsor Farms adjacent to and north of the Koegle property; lands of Mitch Miller, north and east of the Heritage Hills Water District; and lands of Levine, east of Route 100 and Goldens Bridge Road. These properties pose no particular problem in the development of the Town Water Supply. On the contrary, they should be an asset since all water utilities will undoubtedly be installed by the developer at no cost to the District or Town when the land develops.

Other areas of concern at the present time are those in which development has already taken place under a high density zone. These areas consist of: the Lake Lincolndale Area, the Lake Purdys area, and the Lincolndale area near Brick Hill Road and Route 202. These small hamlets have been developed with wells and separate sewage disposal systems on lots as small as a 1/4 acre. Consequently, they are areas subject to pollution of wells from the sewage disposal and are considered to be among the top priority in the development of a water system for the Town. Most other developments within the study area were built under one and two acre zoning and therefore, are not as critical. However wells in several of these developments have very low yields and could be cause for concern in the future.

MISCELLANEOUS

The State Law which set up the New York City Water System made the provision that any municipality which includes portions of either the aqueducts or the New York City reservoirs is entitled to draw water from the New York City supply. The allowable quantity is on a per capita basis equivalent to that supplied to each New York City resident. At the present time, the cost of water to the municipality from the Delaware Aqueduct is $103.72 per million gallons, Croton Water is $76.87 per million gallon.

Two Town established sewer districts exist in the study area, namely, the Heritage Hills Sewer District and the Primrose Sewer District. Both sewer districts are identical in boundary with their respective water districts. Sewage disposal facilities of all other existing developments are limited to sub-surface dis-

posal employing septic systems and leaching fields. One exception is the Lincoln Hall School which has its own sewage disposal plant. The County of Westchester has prepared a comprehensive sewer study in 1968 which included the Town of Somers and other adjoining Towns in Northern Westchester. To date, no sewer district has been formed nor has any work been done to implement the plan in the Town of Somers. Further details on this matter may be found in the Town Development Plan and also in the Comprehensive Sewerage Study prepared by the County.

The extension of County Water District No. 2 is under consideration at the present time by the County and the Town of Somers for extending the district to the boundaries of the present water study area. Upon completion and acceptance of this report, hopefully, further action on the County water district will be taken by the Town.

IV. CONCLUSIONS

The following conclusions have been drawn, based upon the information derived from study of existing conditions and proposed inprovements for the water study area:

1. Two prime sources of supply exist within the study area; namely; (1) Shaft 11 connection at the Delaware Aqueduct; and (2) the County filtration plant at the lower end of Amawalk Reservoir. A possible third source of supply is the ground water source on the property of Sun Enterprises. Other secondary sources are mains from the Town of Yorktown existing at Route 6, Granite Springs Road and at the Amawalk Heights Water District.

2. Six (6) existing water districts or water service areas are located within the water study area and are presently supplying water for the districts or will soon be in operation. These areas are as follows: Heritage Hills Water District, Amawalk - Shenorock Water District, Horton Estates Service area, Amawalk Heights Water District, Lincoln Hall School Water Service area, Primrose Water District. These areas have an existing water distribution system servicing the district area with the exception of Primrose Water District which is beginning construction at this time.

3. The water study area, because of its topography and the presence of sources of supply lends itself well to the establishment of three major water service areas. These water service areas can be operated at different pressure levels making possible a most efficient use of existing water supply and general topography of the area.

IV. CONCLUSIONS (Continued)

4. Three hamlets of high density which are nearly completely developed, exist within the study area. These areas are the Lake Lincolndale area, the Lake Purdys area and the Lincolndale Center Area near Brick Hill Road and Route 202. These areas are developed with individual wells and separate sewage disposal systems on lots as small as one-quarter acre.

5. Large areas of undeveloped land exist within the study area including the Koegle property and lands of General Industries in the northwesterly corner of the Town; lands of Mitch Miller in the northeasterly corner of the Town, and lands of Levine, east of Route 100 and Goldens Bridge Road.

6. Two sewer districts exist within the study area, namely the Heritage Hills Sewer District and the Primrose Sewer District. All other existing development is limited to sub-surface disposal employing septic systems and leaching fields.

7. Ultimate design flow or demand for the water study area is approximately four and one half million gallons per day based upon a design population of 42,000 people in the year 2000.

8. The County is presently undertaking a study of water supply in Northern Westchester to update its 1967 report. This report developed a plan for transmission of water between the northern Towns of the County.

9. The extension of County Water District Number 2 is presently under consideration by both the County and the Town of Somers.

10. Private development, both existing and potential, appears to hold the key to the establishment of water supply improvements within the study area to service the existing critical high

density residential sections.

11. The Lincoln Hall School which is centrally located, has its own existing water system and sewage treatment plant, but is very interested in joining a Town water system and obtaining its water supply therefrom.

12. A Town Water District must be formed before New York City will grant approval to take water from its reservoirs or Aqueducts.

13. It is possible that the water from the Delaware Aqueduct will have to be filtered before distribution to the service areas. At the present time, this is not a requirement of the Health Department.

14. It is unlikely that the Town will build the required improvements to meet the demands of the ultimate population of the water study area. It is more likely that the County, through a County Water District will provide for a large part of the transmission facilities.

15. It is possible that Yorktown may take its future supply from the Catskill Aqueduct thereby eliminating need for a large transmission main across Somers. This would also reduce the load on Shaft 11 and require a different approach to the general plan for the Water Study area.

BJMd

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs,

-versus-

75 Civ. 68 (DOB)

RUSSELL E. TRAIN, as Administrator of the U. S. Environmental Protection Agency, et al., THE STATE OF NEW YORK, et al., THE TOWN OF SOMERS, et al., and HERITAGE HILLS OF WESTCHESTER, et al.,

Defendants.

----------X

December 9, 1975
10:15 a.m.

Deposition of defendant HERITAGE HILLS OF WESTCHESTER, by CURTIS McGANN, taken by plaintiff pursuant to stipulation, at Somers Town Hall, Somers, New York, before Betty Jane Mahoney, a Shorthand Reporter and Notary Public within and for the State of New York.

APPEARANCES:

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, Esqs.
Attorneys for Plaintiffs
430 Park Avenue
New York, New York 10022

By: NICHOLAS A. ROBINSON, Esq.,
of Counsel

BLASI & ZIMMERMAN, Esqs.
Attorneys for Defendant
HERITAGE HILLS OF WESTCHESTER
National Bank of Westchester Bldg.
360 South Broadway
Tarrytown, New York 10591

By: DAVIS M. ZIMMERMAN, Esq.,
of Counsel

* * * * *

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the within deposition may be signed and sworn to before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before a Justice of this Court.

C U R T I S M c G A N N, having first been duly sworn, testified as follows:

EXAMINATION BY

MR. ROBINSON:

Q Will you state your name, please?

A Curtis McGann.

Q Where do you live, Mr. McGann?

A Woodbury, Connecticut.

Q And what is your profession?

A I'm a lawyer.

Q Are you associated with any firm or a partner in any firm?

A I'm a partner in the firm of Sturgis & Mathas.

Q Do you know Henry Paparazzo?.

A Yes.

Q Are you associated with him in any commercial ventures?

A Yes.

Q Is your association that as a business partner or an attorney?

A Both.

Q Are you familiar with Heritage Hills of Westchester?

A Yes.

Q Was is that?

A It's a partnership between Henry Paparazzo and myself.

Q And what is the purpose of the partnership?

A To construct a planned condominium development.

Q Where is that site, or where is that development?

A It's in Somers, New York.

Q Are you familiar with H & H Land Corporation?

A Yes, I am.

Q What is that corporation?

A I characterize it as a usury corporation. At the time the development started New York had certain lending rate limitations and for the purpose of H & H Land Corporation was simply to avoid discovery under the usury laws and nothing else. It was a nominal holder of the title of the property on behalf of the beneficial owners.

Q Who are the beneficial owners?

A Henry Paparazzo and myself.

Q Do you know where Mr. Kipp lives?

A I think he lives down on Route 100.

Q I direct your attention to an affidavit that you made in this action dated February 13, '75, in which you state on information and bleief, several facts at Page 6, Paragraph 5.

I would like to ask you the source of your information upon which you found your belief for these several facts.

How did you come to state that plaintiff Kipp is preliminarily engaged as a gravel operator?

A Basically by all of the sources of information that I have gotten from day one.

Q Do you know what Kipp Brothers is?

A No, I don't.

Q Did you know of--

A When I say that, I don't know any of the particulars of Mr. Kipp's structuring or operation. I know that he has periodically been before the Town authorities for mining permits, and this type of thing. His reputation generally is that he is a gravel operator.

Q Such as the reputation that you have heard about?

A That I have heard about, and that is his preliminary use of that land at the present time.

Q And the source of that information is from what?

A Just general hearsay.

Q And are you familiar with the extent of the acreage owned by Sun Enterprises south of Route 202?

A I know it's a large piece.

Q In excess of 500 acres, were you aware of that scope?

A I guess I was, yes.

Q In the same affidavit you indicated that you believe Mr. Kipp is a resident of North Salem, New York. How did you come to that information?

A Well, when I worked out that affidavit I was sitting with Peter Blasi and we were reviewing information to put it together and I think I got it from Peter Blasi, and I don't know where he lives. Somebody told me he lived down here on Route 100 in Somers. He may have two homes.

Q Do you know that the property of Sun Enterprises, Ltd. extends as far west as beyond Plum Brook?

A Well, I don't really know where Plum Brook traverses.

Q Do you recall the discussion of Plum Brook at the DEC hearing?

A Yes, I recall Plumb Brook, Brown Brook, No Brook and lord knows probably other brooks, too, but I don't know the physical placement of Plum Brook or how it affects Kipp's property or ours.

Q Did you have any personal knowledge of the lake on the Sun property prior to making this affidavit with Peter Blasi?

A When you say personal kowledge, what do you mean?

Q Did you have any other sources of information about the wetlands other than what Peter Blasi told you?

A Yes. In the sense that at the water-taking hearing these elements were brought out and given quite a bit of attention and from that source yes, I would have had.

Q Did it ever come to your attention that Sun Enterprises had decided to stock Brown Brook and the lake on its property with fish?

A I've heard about it.

Q Did you have occasion to study the affidavit in this case in January for those that were responsible for the stocking?

A I think I scanned them briefly.

Q What is the basis for your information that you state upon information and belief the wetlands or swamp were not a locale for the propagating or habitat for wildlife?

A Because I believe that there is a gravel operation there and that that's the principal function of that land as it's held by Mr. Kipp. I assume that a great deal of marshland there was probably excavated out to create that pond and form a source of gravel.

Q Did you ever ask whether or not that assumption is based upon fact or not?

A I may have. I may have.

Q You don't recall?

A I recall that at one time it was given attention on certain maps that -- the geological surveys and the lake and the configuration changes over a period of years and etcetera, but I have no technical knowledge on my own.

Q You testified that you are aware of

special use permits for mining of gravel that Sun obtained from the Town of Somers. Have you ever inspected those permits?

A Personally?

Q Yes.

A No.

Q Are you aware of the bonding requirements of the issuance of those permits?

A I have vague awareness that they are probably like any permit that you have to place a bond to repair the land and that type of thing.

Q Were you aware of the fact that as a special condition on this permit they could not touch Brown Brook or effect adversely Brown Brook?

A No, I wasn't particularly aware of it.

Q Are you aware of the surveys which have been done indicating that all gravel excavations were sloped and graded and performed away from Brown Brook so that all drainage would be away from Brown Brook?

A No.

Q Are you aware that there were a series of permits granted and not such just special use permits overthe years for this purpose to Sun?

A I assume that the operation would require permits over the years and I'm sure that he had a number of them.

Q Were you aware of the use of the Sun property and indeed of other properties including the Heritage Hills property by creational sportsmen prior to or even in the initial stages of your ownership of your site or other adjacent lands?

A Not really, no.

Q Now in your affidavit you attached a map which at one point was a proposed rezoning study for 216 acres of C & R Realty Corp. and 282.5 acres of Sun Enterprises, Ltd. and that map is Exhibit G to your affidavit.

Do you recall -- and I show you a copy of your affidavit or that map attached to your affidavit. Do you recall this exhibit?

A I recall seeing it, yes.

Q Do you know how you came into possession of it?

A No.

Q Was it provided to you by Mr. Blasi or perhaps by Mr. Bibbo?

A Well, I would have to say it was provided

to me by Mr. Blasi. Perhaps -- was it a Bibbo map? I don't recall.

Q In the provisions for developing the Heritage Hills site I believe you testified you take pains to preserve open space and natural areas to some extent. Since you're obviously aware that you can have development and nature in certain harmony or compatible relationship, did it occur to you to inquire whether or not that existed on the property of adjacent landowners?

A What existed?

Q That you would have a gravel operation and a recreational fishing area all on the same site?

A Not really.

Q Did you ever inquire whether the principal purpose of the Sun holdings was for gravel or for real estate investment?

A I was under the impression that both considerations were probably factors.

Q Did you have any information which would lead you to believe which was the principal use of the property?

A I would assume from what I know that gravel was the principal present use of the property

and speculation was possibly a future use.

Q Now, with respect to the same affidavit at Page 25 you indicate that the preliminary injunction sought in this action and the action itself is by reference or inference was designed or if granted will destroy Heritage Hills'.

What is the basis for your statement that the action would destroy Heritage Hills, in view of the fact it was only directed toward the sewage effluent and the siltation and erosion and flooding?

A It would have stopped the project for one thing.

Q Why would it have stopped the project?

A I strongly doubt that we would have either building permits or certificates of occupancy issued by the Town in view of any sort of injunction, temporary injunction.

Q Has the pendency of legal actions including the instant action, stopped such issuance of Town permits today?

A No, it has no effect.

Q You stated upon information and belief that Kipp in 1972 embarked on a plan to compel the

private defendnats to buy his property or suffer the consequences of harrassment. What is the basis for your information?

A Discussions with Henry Paparazzo.

Q And what was the nature of those discussions and when were they had?

What were the discussions with Henry Paparazzo and when did they take place?

A I don't recall any particular single discussion, but I believe that this was the nature of the situation as it was expressed to my by Henry and I know Henry to be a person who does not fabricate this type of thing. I rely on his statements.

Q Did you inquire as to the facts which underlye his statement?

A Yes, I'm sure I did at any given time. I'm sure he expressed them, but I don't recall them offhand in particular.

Q Do you recall public statements by Mr. Kipp that he was terribly pleased with the fact that Heritage was coming in and he could not be more for the project of success if he owned it, but he wanted to make sure that it did not have an adverse affect on his property?

CERTIFICATE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I, BETTY JANE MAHONEY, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That CURTIS McCANN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that the foregoing transcript is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of December, 1975.

Betty Jane Mahoney
BETTY JANE MAHONEY

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

430 PARK AVENUE, NEW YORK, N.Y. 10022 · (212) 421-7200

April 10, 1975

Richard Tisch, Esq.
U.S. Environmental Protection
Agency
Region II
26 Federal Plaza
New York, New York

Re: NPDES Permit No. N.Y. 0026891

Dear Mr. Tisch:

This will confirm our telephone conversation of this afternoon.

We are counsel for Sun Enterprises, Ltd. and the Southern N.Y. Fish & Game Association. Both have an interest in the above-captioned NPDES permit for discharge into Brown Brook in the Town of Somers as set forth in Sun Enterprises, Ltd., et al. v. Train, et al., 75 Civ. 68 (DBB).

Analysis of the effluent during a test on February 27, 1975, shows violation of the effluent limits in the NPDES permit. The data and violation are set forth in the enclosed affidavit sworn to April 8, 1975.

As of at least 2:30 P.M. today, the effluent which purports to be allowed under the above-captioned NPDES permit had started again. Our clients describe the pipe at about 1/3 full and discharging a brownish colored liquid with a strong chlorine smell. We shall have samples of this effluent tested promptly.

Because of the February 27, 1975 analysis and the observations of our clients made and reported this afternoon, we have reason to believe the NPDES permit is being violated further. We respectfully request that you investigate at once.

Very truly yours,

Nicholas A. Robinson

NAR:sj

cc: Hon. Dudley B. Bonsal
William R. Bronner, Esq.
O. Harper LeCompte, Esq.
Harry Chambers, Esq.
Leonard J. Saccio, Esq.
Blasi & Zimmerman, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs,

-against-

RUSSELL E. TRAIN, as Administrator of the U.S. Environmental Protection Agency, ET AL., THE STATE OF NEW YORK, ET AL., THE TOWN OF SOMERS, ET AL., and HERITAGE HILLS OF WESTCHESTER, ET AL.,

Defendants.

- -x

75 Civ. 68 (DBB)

AFFIDAVIT

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

RAUL CARDENAS, JR., being duly sworn, deposes and says:

1. I hold a Ph.D. in environmental sciences and am an assistant professor at the Polytechnic Institute of New York. My curriculum vitae is attached as Exhibit A to my affidavit sworn to December 2, 1974. I make this affidavit to complete the record regarding my analysis of a liquid discharge on February 27, 1975, from the sewer pipe for Heritage Hills of Westchester. I partially described the results of my analysis of this effluent in my affidavit sworn to February 28, 1975.

2. The results of the tests of this discharge conducted under my supervision are attached as Exhibit A to this affidavit. Exhibit A identifies the sites from which test samples were taken all on February 27, 1975. Sites numbered 1, 8 and 9, are sample sites in the stream. They are the same sites as those described in my report attached to my December 2, 1974 affidavit, while sites A and B are the same, site, from the discharge pipe itself. Samples of the effluent were gathered twice from the point of discharge before the liquid reached the stream, with A being sampled at 1:00 P.M. and B at 3:00 P.M.

3. Since the coliform count of the effluent was lower than the receiving water in Brown Brook, it appears likely that this effluent did constitute a test run of the waste water treatment plant, as I have been advised the private defendants have stated.

4. However, analysis of the effluent content even from this apparent test run confirms my prior evaluation that the treatment plant processes will cause nitrogenous and phosphate enrichment of the waters of Brown Brook which will result over time in eutrophication of No Bottom Marsh.

5. As shown in Exhibit A hereto, the levels of ammonia (as nitrogen) (NH_3-N) are approximately triple that of the receiving waters. The levels of nitrate (as nitrogen) (NO_3-N) are approximately 4 times as much as measured in the receiving waters. The levels of phosphorous (as orthophosphate) ($O\text{-}PO_4\text{-}P$) are about two and one-half times as much as in Brown Brook.

6. With reference to NPDES Permit No. N.Y. 0026891, the discharge effluent levels are set for phosphorous at .5 mg/l and for ammonia as nitrogen (NH_3-N) at 2 mg/l. The levels of actual effluent for phosphorous thus exceed permissable levels set forth in the NPDES Permit and are well above the levels considered to be critical since the systems in the area are phosphorous limiting. Although ammonia was within the limit, the level in discharge effluent will rise when wastes are introduced and further contribute to the environmental stress on the natural systems.

7. These facts confirm my prior evaluation that the effluent constitutes unnecessary pollution which will result in a serious threat to biota and reduction of drinking water quality on the property of Sun Enterprises. There are, of course, alternative treatment processes and effluent pipe locations available which would not cause this impact.

8. This deteriorating situation is hastened by the heavy silt load present in Brown Brook apparently every time it rains. My tests during rain on February 24, 1975, confirm this, and contrast to the situation without rain sampled February 25, 1975. The total solids in suspension are roughly 82 times as great under rainy conditions than not. This relatively heavy silt load appears to enter Brown Brook from above Route 202. The silt fills in marshy areas as it settles out of suspension and the shallower water is warmed more easily and proceeds to eutrophication more quickly. The high percentage of violatile solids under rain conditions further enriches the marsh contributing to eutrophication and to an immediate environmental impact on the system.

9. The only effective means to protect the fish, wildlife and other biota and drinking water quality is to remove the effluent discharge point and eliminate the sources of siltation.

Raul Cardenas, Jr.

Sworn to before me this
8TH day of April, 1975.

Notary Public

NICHOLAS ADAMS ROBINSON
Notary Public, State of New York
No. 30[illegible]5
Certified in [illegible] County
My Commission Expires March 30, 1977

Sun [illegible] Inc.

[illegible] N Y

Date of Sampling 2/27/84 Time: 1:[illegible] [illegible] P.M.

[illegible]

Site	[illegible] (mg/L)	pH	NH_3-N (mg/L)	[illegible]	[illegible] (mg/L)	[illegible] (mg/L)	[illegible]	COD (mg/L)
1	0.22	7.5	0.27	0.26	[illegible]	80	11.2	7.8
[illegible]	[illegible]	7.8	0.75	[illegible]	[illegible]	[illegible]	[illegible]	12.5
[illegible]	[illegible]	7.9	0.79	[illegible]	[illegible]	[illegible]	[illegible]	10.2
[illegible]	[illegible]	7.2	[illegible]	[illegible]	0.24	—	11.6	—
[illegible]	[illegible]	7.1	[illegible]	[illegible]	0.26	—	[illegible]	—

Note: [illegible] Pipe - A - [illegible]
[illegible] B - [illegible]

1, 2, 3, 9 as on flyer.

Date of Sampling: 2/24, 2/25/84

[illegible] Condition: [illegible]

Site	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

Exhibit A

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Westchester at the Courthouse in White Plains, New York on the 26th day of August, 1974.

PRESENT: HON. HAROLD L. WOOD, JUSTICE
Justice of the Supreme Court

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SUN ENTERPRISES, LTD.,

Petitioner,

ORDER TO SHOW CAUSE

-against-

Index #

JAMES L. BIGGANE, Commissioner of New York State Department of Environmental Conservation.

Respondent.

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Upon the annexed petition of Lyman E. Kipp, verified the day of August, 1974 and upon the affidavit of William J. Florence, Jr., sworn to the 16th day of August, 1974, and the exhibits attached thereto, it is

ORDERED that the respondent above named show cause at a Special Term, Part I of this Court to be held in the County of Westchester at the Courthouse in White Plains, New York, on the 5th day of September 1974 at 9:30 a.m. why an Order should not be entered requiring the respondent to hold hearings under Article 17, Title 8, dealing with the deposit of pollution into a stream known as the Brown Brook and designated by the New York State Department of Conservation as stream number 31-P-44-18 and for such other and further relief which to the Court may seem just and proper.

Sufficient reason appearing, let service of a copy of this order and copies of the papers upon which it is granted on the respondent at

his office at 50 Wolf Road, Albany, New York and the office of the Attorney General at his office at 2 World Trade Center, New York, New York, by mail, on or before the 29TH day of AUGUST, 1974, be deemed good and sufficient service.

Harold Tyler

J. S. C.

HON. HAROLD L. TYLER, JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SUN ENTERPRISES, LTD.,

Petitioner,

AFFIDAVIT

-against-

JAMES L. BIGGANE, Commissioner of New York State Department of Environmental Conservation,

Respondent.

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

WILLIAM J. FLORENCE, JR., being duly sworn, deposes and says:

I am an attorney licensed to practice in the State of New York and am a member of the firm Dempsey Spring Moloney & Florence.

I make this affidavit in support of an Order to Show Cause to compel the New York State Department of Environmental Conservation to hold hearings under Article 17, Title 8 dealing with the deposit of pollution into a stream known as the Brown Brook and designated by the New York State Department of Conservation as stream number 31-P-44-18.

The Department of Environmental Conservation held hearings to take testimony on the following issues: 1) to develop a water supply system for a condominium development of 3,100 units, 2) to construct a sewage pipe to take the sewage off applicant's property and to deposit

the sewage effluent in the Brown Brook immediately north of the property of Sun Enterprises, Ltd., 3) to dam up the Brown Brook on the property of the applicant and 4) to relocate a portion of the stream on the applicant's property.

Hearings were held intermittently from September 17 to October 10, 1973, during which time I moved to expand the purpose of the hearing to include an application by Petitioner, Heritage Hills Enterprises, to deposit a pollutant discharge into the Brown Brook. My application was denied. Thereafter, in December of 1973, the Department of Environmental Conservation posted a notice that it had received an application for a permit to pollute the Brown Brook at which time any persons interested in the application or who wished to comment or become interested parties in the proceeding, were directed to notify the Commissioner. This was done by me and by my client, Sun Enterprises, Ltd. My client and I were further assured orally that the Commissioner intended to hold such a public hearing.

Apparently, the Commissioner has decided not to hold such public hearing and accordingly, we have been denied an opportunity to a public hearing and forum in order to present expert testimony in connection with the pollutant discharge into the Brown Brook and the effects that it would have on the Brown Brook and adjacent wetlands and private water supplies. The Department of Environmental Conservation having denied us an opportunity to expand the hearing to include the deposit of pollutants into the stream, now advises that it is not necessary to schedule a hearing on the subject certification.

It is respectfully submitted that to prevent an objectant from producing expert testimony as to the effect of polluting the stream is

a direct contravention of the policy of the State of New York as recited in Article 17 of the Environmental Conservation Law. The objectant in this case is a downstream owner of the stream which the applicant seeks to pollute. However, the Court should also note that applicant does not intend or plan to pollute the stream on his own property rather he will, according to his plans, divert the pollution into the stream to a point off his property to the south adjacent to the Sun Enterprises parcel where the sewage effluent will join the Brown Brook and thoroughly pollute the stream. We have retained environmental, geophysical and microbiological experts. Those testimony and opinions the Commissioner apparently now refuses to hear.

No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request that the Commissioner of Environmental Conservation hold hearings with respect to the application of Heritage Hills of Westchester pursuant to the policies, purposes, requirements and prohibitives pursuant to Article 17, Title 8 of the Environmental Conservation Law.

WILLIAM J. FLORENCE, JR.

Sworn to before me this

16th day of August, 1974.

Ann M. Cichocki Comello

ANN M. CICHOCKI
Notary Public, State of New York
No. 43-4522478
Qualified in Westchester County
Term Expires March 30, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SUN ENTERPRISES, LTD.,

Petitioner, PETITION

-against-

JAMES L. BIGGANE, Commissioner of New York State Department of Environmental Conservation,

Respondent.

----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

LYMAN E. KIPP, being duly sworn, deposes and says:

I am President of Sun Enterprises, Ltd., the owner of land across which traverses a stream known and designated by the State of New York as stream number 31-P-44-18 and commonly known as the Brown Brook. The aforesaid stream drains a watershed area constituting a substantial portion of land owned by Sun Enterprises, Ltd. It is also the proposed receiver of sewage discharge from a sewer plant servicing a proposed 3100 dwelling units and being developed by Heritage Hills of Westchester.

That the Brown Book drains generally southerly from Heritage Hills of Westchester into a wetlands area on the property of Sun Enterprises, Ltd. The stream is not defined in the wetlands area. As the waters from the wetlands drain, a stream again becomes defined as above designated. The stream thereafter continues generally

southerly along lands of Sun Enterprises a distance in excess of one-quarter (1/4) mile and ultimately finds its way to the watershed area of the City of New York in the Amawalk Reservoir.

Heretofore, the Department of Environmental Conservation held hearings for the purpose of : 1) Establishing a water district under water supply application number 6284 and 2) For the construction of a dam and 3) A sewage effluent discharge structure and 4) The relocation of a portion of the aforesaid stream in application number 360-24-0051 (SP 85 and SP 86). The hearings commenced on September 17, 1973, intermittently until concluded on October 10, 1973. During the hearings my attorney, William J. Florence, Jr., on behalf of Sun Enterprises, Ltd., made a motion to expand the hearing to include in the hearing Title 8 of Article 17 of the Environmental Conservation Law, namely, to determine whether or not a pollutant discharge elimination system may drain into the stream and whether or not there would be a discharge from the sewage effluent discharge structure prohibited by the provisions of Article 17, Title 8 of the Environmental Conservation Law, or any regulation by the state adopted applicable thereto. The motion to expand the hearing to include the applications, being heard and determined, the application for issuance of a permit for a pollutant discharge into a New York State stream was denied by the New York State officer conducting the hearing.

Thereafter, on January 17, 1974, a decision was rendered by William A. Dickerson, the hearing officer for the Department of Environmental Conservation, dealing with the application for supply of water, for the construction of a dam, for the construction of a sewage discharge effluent structure, and the relocation of a portion of the stream and which decision did not deal with the pollution of the stream

itself.

Thereafter, on June 10, 1974, pursuant to my continuing requests, a member of the Department of Environmental Conservation on behalf of the Commissioner, James Biggane, denied my application, and the application of other interested parties, to conduct a hearing to determine whether or not the Commissioner should issue a permit to deposit such effluent into the aforesaid stream and if so, under what conditions. The letter itself, a copy of which is annexed hereto as Exhibit A and made a part hereof, refers to testimony of the earlier hearing. It quotes the testimony of a person who was never actually upon the Sun Enterprises, Ltd. property, nor ever tested the water on the property. The letter ignores contrary expert opinion which we requested an opportunity to produce and to expand. Thus, by refusing to expand the earlier hearings and later by refusing even to conduct a hearing, I have been precluded from any forum for producing expert testimony relevant to the deposit of sewage effluent in the Brown Brook.

I respectfully request that the Court order the Commissioner to hold hearings or show cause why hearings should not be held and why we should not be given an opportunity to produce expert testimony showing the effect on the receiving stream of such pollution and for such other and further relief as may seem just and proper.

LYMAN E. KIPP

Sworn to before me this

day of , 1974.

New York State Department of Environmental Conservation
50 Wolf Road, Albany, New York 12201

James L. Biggane,
Commissioner

June 10, 1974

Mr. Lyman Kipp
Sun Enterprises, Ltd.
Route 100
Somers, New York 10589

Re: STATE CERTIFICATION
NPDES APPLICATION NO. NY-0026891
HERITAGE HILLS OF WESTCHESTER
SOMERS (T), WESTCHESTER COUNTY

Dear Mr. Kipp:

The following is in response to your letter of May 20, 1974, regarding the above referenced NPDES application and associated certification of State water quality standards.

As you are well aware, the applicant, H & H Land Corporation, proposes to discharge treated sanitary wastes into the Brown Brook at a rate of approximately 700,000 gallons per day. At the direction of this Department, the applicant was required to design his treatment process to provide a final effluent that would be compatible with an intermittent stream. This very high degree of treatment produces a final effluent which is self supporting; that is, it produces an effluent which could constitute the only flow in a stream and result in no objectionable nuisances. In most instances, the effluent from a treatment plant designed to these standards is actually cleaner than the natural water into which it is being discharged. This was pointed out by the applicant's engineer during testimony presented during the public hearings conducted during September and October of 1973 for the water supply application for the proposed development. In testimony presented at these hearings, Mr. Calvin Weber of the Westchester County Health Department stated that there should be no adverse affect on water quality downstream resulting from the treated effluent. Thus, from testimony presented at those hearings, it would appear that there should be no adverse affect on water quality or on land use resulting from water quality downstream from the proposed discharge. This would include the wetlands of Sun Enterprises which you mentioned in your letter.

Exhibit "A"

As to the affect of the increased quantity of water flowing in Brown Brook as a result of the proposed discharge, testimony was introduced at the above mentioned hearings by Mr. McPhee, indicating that an increase in water surface elevation of 0.017 feet could be anticipated in the wetlands of Sun Enterprises.

It is our opinion that the rather extensive and comprehansive hearings conducted during the fall of last year regarding the proposed development sufficiently answered all questions presented at that time and that the comments that we have received to this date on this application are basically a restatement of questions posed at that time. Therefore, we are not scheduling a hearing on the subject certification.

Very truly yours,

Frederick W. Sievers, P.E.
Senior Sanitary Engineer

For: William L. Garvey, P.E.
Chief, PDES Permit Section
Division of Pure Waters

JOHN D. DINGELL
16TH DISTRICT, MICHIGAN

WASHINGTON OFFICE:
ROOM 2210, RAYBURN HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515

DISTRICT OFFICE:
4917 SCHAEFER ROAD
DEARBORN, MICHIGAN 48126

ENTERED IN DOCKET

Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEES:
INTERSTATE AND FOREIGN COMMERCE
CHAIRMAN, SUBCOMMITTEE ON ENERGY AND POWER
SMALL BUSINESS
CHAIRMAN, SUBCOMMITTEE ON ENERGY AND ENVIRONMENT
MERCHANT MARINE AND FISHERIES
MIGRATORY BIRD CONSERVATION COMMISSION

March 28, 1975

Honorable Dudley B. Bonsal
U.S.D.J., S.D.N.Y.
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Sun Enterprises, Ltd., et al. v.
Russell E. Train, et al. - 75
Civ. 68 (DBB)

Dear Judge Bonsal:

This letter is submitted to you as a memorandum amicus curiae in the above-captioned matter.

It has come to my attention that on February 25, 1975, the Assistant United States Attorney for the Southern District of New York, Mr. William Roche Bronner, filed an affidavit in the above-captioned matter which refers to statements made by an Associate Counsel of the House Committee on Government Operations concerning various actions taken by Congressman Henry S. Reuss and me.

Congressman Reuss and I were instrumental in persuading the House of Representatives in March, 1972, to strike from the bill as reported by the House Committee on Public Works a provision that would have made the Coordination Act inapplicable to the permit program. The House-Senate conferees agreed to the deletion of this restrictive language. (S. Rept. 92-1236, Sept. 28, 1972, pp. 148-149.) The Federal agencies have now agreed that the Coordination Act is applicable to these permits.

The Government's affidavit which is based on a telephone conversation implies that Congressman Reuss and I entered into an interim agreement with the Interior Department pursuant to which the Interior Department would send to the Environmental Protection Agency "no comment" form letters, without any review under the Fish and Wildlife Coordination Act, concerning applications for permits under section 402 of the Federal Water Pollution Control Act (Public Law 92-500; October 18, 1972).

Enclosed is a copy of a letter I have today sent to the Secretary of the Interior which makes it clear that the Interior Department, not Congress or any Member thereof, has independently decided not to comply with the requirements of the Fish and Wildlife Coordination Act. Interior's action of filing pro forma statements that it would not comment because of lack of funds and/or personnel makes a sham of the law.

Neither Chairman Reuss nor I agreed to any such device for abdication of a statutory duty. Our request that Interior document its actions and reasons for non-action was designed to develop a record of the facts so that we could take steps to justify additional funds and personnel for the Department to perform its duty under the Coordination Act. But we never dreamed that Interior would simply abstain from its duties in virtually all or a majority of cases and cloak its abdication under the guise of the "no comment" responses.

In our judgment, the Environmental Protection Agency must, under the Fish and Wildlife Coordination Act, affirmatively consult with Interior and Interior has an obligation to respond to EPA's request for comments on a permit application with more than a pro forma "no comment" reply.

I respectfully request that this letter and enclosure be made a part of the public record in this case.

Sincerely,

John D. Dingell
Member of Congress

c

cc: Marshall, Bratter, Greene, Allison & Tucker
William R. Bronner, Esq.
O. Harper LeCompte, Esq.
Harry Chambers, Esq.
Leonard J. Saccio, Esq.
Angus Macbeth
Blasi & Zimmerman, Esqs.

JOHN D. DINGELL
16TH DISTRICT, MICHIGAN

WASHINGTON OFFICE:
ROOM 2210, RAYBURN HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515

DISTRICT OFFICE:
4917 SCHAEFER ROAD
DEARBORN, MICHIGAN 48126

Congress of the United States
House of Representatives
Washington, D.C. 20515

INTERSTATE AND FOREIGN COMMERCE
CHAIRMAN, SUBCOMMITTEE ON ENERGY AND POWER
SMALL BUSINESS
CHAIRMAN, SUBCOMMITTEE ON ENERGY AND ENVIRONMENT
MERCHANT MARINE AND FISHERIES
MIGRATORY BIRD CONSERVATION COMMISSION

April 9, 1975

Honorable Dudley B. Bonsal
U.S.D.J., S.D.N.Y.
U.S. Courthouse
Foley Square
New York, New York 10007

Dear Judge Bonsal:

This is in reference to my letter to you of March 28, 1975, regarding Sun Enterprises, Ltd. v. Russell E. Train.

It appears that a copy of the letter that I sent to the Secretary of the Interior might have been inadvertently left out of my communication and I am, therefore, enclosing a copy of this letter now.

With every good wish,

Sincerely yours,

John D. Dingell
Member of Congress

c

cc: Marshall, Bratter, Greene, Allison & Tucker ✓
William R. Bronner, Esq.
[illegible] Harper LeCompte, Esq.
[illegible] Harry Chambers, Esq.
Leonard J. Saccio, Esq.
[illegible] David A. Zimmerman, Esqs.
Angus Macbeth

A148

March 28, 1975

Honorable Rogers C. B. Morton
Secretary
Department of the Interior
Washington, D. C.

Dear Secretary Morton:

In 1973, the Environmental Protection Agency sought an opinion from the Attorney General that the Fish and Wildlife Coordination Act (16 U.S.C. 661, et seq.) is not applicable to discharge permits issued by EPA and the States pursuant to section 402 of the Federal Water Pollution Control Act (Public Law 92-500, Oct. 18, 1972). After considerable correspondence by Congressman Henry S. Reuss, then Chairman of the House Conservation and Natural Resources Subcommittee, and myself, with the Justice Department, EPA, Commerce Department, and Interior, EPA withdrew its request for an Attorney General's opinion.

On May 9, 1973, the Commerce Department advised us as follows:

> "We are pleased to advise that the issue of whether the provisions of the Fish and Wildlife Coordination Act apply to pollutant discharge permits issued by EPA under Section 402 of the Federal Water Pollution Control Act Amendments of 1972 has been satisfactorily resolved between the appropriate departments and agencies of the Executive Branch. At a meeting in the Old Executive Office Building today between OMB, EPA, Justice, Interior and Commerce/NOAA, it was agreed that the provisions of the Fish and Wildlife Coordination Act do indeed apply, and that both Interior and Commerce/NOAA will have an opportunity to review and comment on all applications for permits under the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500). The EPA regulations on the new program will be appropriately amended to require notice and consultation."

The EPA regulations were published on May 22, 1973 (38 F.R. 13522). They stated that your Department's Fish and Wildlife Service and the Commerce Department's National Oceanic and Atmospheric Administration could "waive" their right under the Fish and Wildlife Coordination Act to receive and review applications filed with EPA for discharge permits under Section 402 of the FWPCA.

By letter of June 6, 1973, Chairman Reuss and I criticized those regulations as not complying with the requirements of the law. Our letter to you stated as follows:

> "We recognize that, for various reasons, including inadequate funding and personnel, your agencies will not be able to provide extensive comments and recommendations on every permit application. But we think that you have an obligation under the Coordination Act to, at least inform in writing EPA, the Corps of Engineers, and other permitting or licensing agencies, and, most importantly, the public that a particular permit application will have no significant effect on fish, shellfish and wildlife resources, or that you lack the funds and manpower to comment thereon. The House Committee on Government Operations, in its report (H. Rept. 92-1401, Sept. 18, 1972), entitled "Protecting America's Estuaries: Puget Sound and the Straits of Georgia and Juan de Fuca" emphasized that the Corps and other licensing or permitting agencies have "an obligation to seek" your "formal comments on each permit application or determine that" you have "none to make." They cannot meet this obligation if you fail to inform them in a timely fashion, or if you are silent on the application. Furthermore, you fail to meet your obligation under the law and to the public if you "waive" your "right to receive any permit applications or categories thereof," or if, through informal meetings, you agree to waive receipt of some applications.
>
> We therefore request that the Interior Department:
>
> (a) not waive its right to receive any permit application or categories thereof filed with EPA after June 1, 1973;
>
> (b) insist on receiving each application filed with the Corps or EPA prior to June 1, 1973; and
>
> (c) formally inform EPA in writing in the case of each permit application and in a timely fashion either (i) that the discharge will, or will not, significantly affect fish, shellfish, wildlife and other resource values, or (ii) that you are unable to comment under the law because of a lack of funds and/or personnel, and (iii) that your statements mentioned in (i) and (ii) above be available to the public.
>
> We do not view these matters as simply a paper exercise. Both Interior and Commerce have the obligation to carry out fully the requirements of the Coordination Act. That you have not done so to date is shown in the table prepared by Assistant

Secretary Reed concerning Corps permit applications upon which the Fish and Wildlife Service (which formerly included the fish and wildlife functions now exercised by both Interior and Commerce) did not comment during the last 10 fiscal years (See Cong. Rec. (daily issue) June 4, 1973, pp. H4254-H4261, copy enclosed). Just as we have insisted that the Corps and EPA meet their obligations under the law, it is our intention to insist that your agencies do the same."

Your Department and the Commerce Department agreed to our request.

However, a recent investigation by the Subcommittee staff and the General Accounting Office indicates that your agency is not commenting on any EPA permit applications. The correspondence concerning this matter is printed in the Hearings of the House Conservation and Natural Resources Subcommittee entitled "Protecting Florida's Estuaries, Florida" (Part 1-A, pp. 1261-1366).

For example, we understand that in the Atlanta and Boston regional offices of the Fish and Wildlife Service all permit applications under Section 402 are simply placed in boxes, without any review, and a form letter sent to EPA as to each application saying that the Fish and Wildlife Service cannot comment on the application because it lacks funds and/or personnel. Such total disregard for the mandates of the Coordination Act is disgraceful, particularly in view of the fact that your Department and the Fish and Wildlife Service are doing nothing to remedy this situation. We understand that no funds have been included in the President's budget for fiscal year 1976 to review and comment on these applications.

In our opinion, your Department's 1973 agreement to enforce the Coordination Act is a sham. While we expected that Interior might not comment on a few applications because of lack of funds and/or personnel, we never expected that Interior would simply abdicate this duty in all or even in a majority of cases.

In our opinion, EPA has an affirmative duty to consult, and Interior has an affirmative duty to respond, under the Coordination Act. Silence by Interior on an application cannot legally be viewed by EPA as concurrence. Interior's pro forma statements of "no comment because of lack of funds and/or personnel" are the equivalent of silence and equally illegal.

Please advise me by April 30, of what action you will take this fiscal year to have the Department comply with the Coordination Act in the review of applications for permits under Section 402 of the FWPCA.

I am sending a copy of this letter to Congressman Robert L. Leggett, Chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries. Please provide a copy of your reply to him.

Sincerely,

John D. Dingell
Member of Congress

ENTERED IN DOCKET

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

WRB:par

D-55-09

75-0078

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

April 1, 1975

Honorable Dudley B. Bonsal
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Sun Enterprises, Ltd. v. Train

Dear Judge Bonsal:

We are in receipt of a copy of a letter from the Honorable John D. Dingle, a member of the Congress, who comments on certain representations made in our affidavit dated February 25, 1975. The specific language apparently referred to is as follows:

> "Mr. Finnegan [of the Congressman's staff] advised me that a controversy remains, however, on the extent of performance by the Department of the Interior ("Interior") required under the Coordination Act. The matter has not been finally resolved, but an interim agreement has been arranged between the Congress and Interior."

The Congressman then goes on to state that his committee, in agreeing on a methodology (described in the affidavit) whereby Interior could create a record of the effort which would be necessary to "upgrade" its present response pattern to NPDES permit referrals (described in the remainder of the affidavit), was not "agreement] to any such device for abdication of a statutory duty...we never dreamed that Interior would simply abstain from its duties..."

It was not the intent of the affidavit to imply any concession by any members of Congress concerning interpretation of the scope of the Coordination Act. At argument we handed up to the

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Court the reference material furnished to us by Congressman Dingle's staff, so that the Court would be advised concerning the present state of enforcement of the Coordination Act. We believe that those materials accurately present the views of Congressman Reuss and Dingle, including the views expressed in the instant letter.

Respectfully,

PAUL J. CURRAN
United States Attorney

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WILLIAM R. BRONNER
Assistant United States Attorney
Telephone No.: 212-791-1946

cc: Honorable John D. Dingle
Member of Congress
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Environmental Protection Agency
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ATTN: Richard Tisch, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs,

-against-

RUSSELL E. TRAIN, as Administrator of the U.S. Environmental Protection Agency ["EPA"], GERALD N. HANSLER, as Region II Administrator, EPA, ROGERS MORTON, as Secretary, U.S. Department of the Interior, and THE UNITED STATES OF AMERICA ["Federal Defendants"], ET AL.,

Defendants.

- -x

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CONSENT

It is consented and agreed by and between counsel for the Plaintiffs and for the Federal Defendants, subject to the approval of the Court, that the attached Final Judgment may be entered forthwith pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: New York, New York
July 23, 1975

A Member of the Firm
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs,

-against-

RUSSELL E. TRAIN, as Administrator of the U.S. Environmental Protection Agency ["EPA"], GERALD N. HANSLER, as Region II Administrator, EPA, ROGERS MORTON, as Secretary, U.S. Department of the Interior, and THE UNITED STATES OF AMERICA ["Federal Defendants"], ET AL.,

Defendants.

- - - - - - - - - - - - - - - - - - - -x

75 Civ. 68 (DBB)

AFFIDAVIT IN SUPPORT OF RULE 54(b) APPLICATION

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

NICHOLAS A. ROBINSON, being duly sworn, deposes and says:

1. I am an attorney duly admitted to the bar of this Court and associated with Marshall, Bratter, Greene, Allison & Tucker, attorneys for the plaintiffs in the above-captioned matter.

2. Plaintiffs have prepared and are about to file a petition pursuant to §509 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1369 ("Water Act") for judicial review of National Pollutant Discharge Elimination System Permit No. N.Y. 0026891 ("NPDES Permit"). The plaintiffs' petition will raise questions of procedural due process of law as well as a substantive challenge to the terms of the NPDES Permit. The procedural issues were those presented by plaintiffs in the above-captioned suit.

3. By decision of this Court and its Order dated May 27, 1975, this Court determined that exclusive jurisdiction over both procedural and substantive matters involving an NPDES Permit vests in the Court of Appeals. In order to preserve plaintiffs' rights and to present the jurisdictional alternatives to the Court of Appeals, plaintiffs wish to appeal from so much of this Court's May 27, 1975 Order as ruled that the District Court lacked jurisdiction, at the same time as plaintiffs present their original petition under §509 of the Water Act.

4. By proceeding in this fashion, the Court of Appeals can consider the jurisdiction issues at the same time and resolve them. Plaintiffs will move to consolidate consideration by the Court of Appeals of their original jurisdiction petition and their appeal from so much of this Court's May 27th Order as involved issues of jurisdiction.

5. These jurisdictional issues were ones of first impression before the District Court. I am advised by the Environmental Law Institute, a Washington, D.C. based national publishing and clearing house for environmental law developments, that the petition which plaintiffs will file under §509 of the Water Act will be the first petition filed nationally seeking review of a specific NPDES Permit.

6. Accordingly, in order to achieve economies of judicial time, to present the same issues of first impression on alternative jurisdiction bases to the Court of Appeals at the same time and to avoid prejudice to plaintiffs' rights, I urge this Court to allow entry of a final judgment against the Federal Defendants, as provided in the annexed proposed Order, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

7. The U.S. Attorney, by William Bronner, Esq., Assistant U.S. Attorney, S.D.N.Y., counsel for the Federal Defendants has consented to entry of final judgment of dismissal under Rule 54(b), F.R. Civ. P.

8. I am advised as recently as July 22, 1975 by Dr. Raul Cardenas, an expert environmental scientist for plaintiffs, that eutrophication of surface waters in Brown Brook and No Bottom Marsh is proceeding rapidly and that the lake and subsurface waters are in jeopardy of irreparable harm. Accordingly, there is increasing urgency in submission of the merits of plaintiffs' claims regarding the NPDES permit to the appropriate forum.

Wherefore, I respectfully urge this Court to enter final judgment of dismissal against the Federal Defendants pursuant to Rule 54(b), F.R. Civ. P.

Nicholas Robinson

Sworn to before me this
23rd day of July, 1975.

Notary Public

[illegible] March 30, 1977

Services of three (3) copies of
the within
is
hereby admitted this 9th day
of January, 1976

Peterson Russell Kelly McClintock

Attorneys for Defendants

Services of three (3) copies of
the within
is
hereby admitted this
day
of
, 197

Attorneys for

3

COPY RECEIVED
Thomas J. Cahill
UNITED STATES ATTORNEY
1-9-76